

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

**FEBRUARY 23, 2006
MORNING PAPER
QUESTIONS**

ESSAY SECTION

1. Sam, a widower, died in 1994, survived by an estranged adopted son, Junior. Sam left a will that did not mention Junior. Junior was not notified of Sam's death or of the filing of the petition for the probate of Sam's will. The Massachusetts Probate and Family Court allowed the probate of Sam's will which named his friends, David and Mary, as executors and left his entire estate of \$12,000,000 to them in a trust as trustees for the benefit of Hospital, a not-for-profit corporation specializing in acute cardiac care.

Sam's will provided (1) that the trustees distribute all the net income from the Trust's investments quarterly to Hospital, and (2) that the trustees were entitled to pay themselves compensation for their services. The will made no provision for the appointment of new trustees upon the death or disability of David and Mary.

Until 2003, David and Mary distributed half of the net income each year to Hospital and paid themselves \$200,000 each, annually, from the principal of the Trust. In that year, Hospital was acquired by Nationwide Cardicare Corp., ("Nationwide") a chain of for-profit clinics. In 2004, David died intestate and Mary, diagnosed with Alzheimer's disease, became unable to attend to the Trust.

Junior recently learned of Sam's death. He has petitioned the Massachusetts Probate and Family Court (a) to revoke the allowance of Sam's will; (b) to be appointed administrator of David's estate; (c) to be appointed guardian of Mary; and (d) to be appointed successor trustee of the Trust. He has notified Nationwide and the Attorney General of Massachusetts of the petitions. The Court has consolidated the four petitions.

What are the rights of the parties?

2. Ames, interested in starting a business to manufacture cellular telephones, spent much time and money studying its feasibility and concluded that it could be successful. Ames entered into a long-term contract with Dash, a national cellular service, to supply telephones to it. Ames signed the contract as President of CelPhon, Inc.

Ames then contacted his friend, Baker, to go into business with him. They formed a Massachusetts corporation named CelPhon, Inc. (“CelPhon”), and each subscribed for 1,000 shares of stock in the corporation at \$500 per share. Neither paid for the stock, although Baker deeded to CelPhon an office building appraised at \$500,000, which Baker had purchased five years earlier for \$250,000.

Thereafter, Ames and Baker solicited Chase to join CelPhon. Chase bought 1,000 shares of stock from the corporation for \$500,000. Neither Ames nor Baker told Chase how they had acquired their stock. Ames, Baker and Chase each became officers, directors and employees of CelPhon.

CelPhon’s business grew, but Ames, Baker and Chase continually disagreed over corporate management decisions. One such disagreement involved the repeated refusal of Ames and Baker, over Chase’s objection, to vote to declare corporate dividends despite several warnings from CelPhon’s tax attorneys, which resulted in a large tax penalty being assessed against the corporation.

Over time, Chase became disillusioned with the way business was being conducted and tendered his stock for sale to the corporation. His tender was refused by both Ames and Baker, and, although he remained an officer and director of the corporation, he quit his job there to start a similar business which attracted many of CelPhon’s customers.

Recently, the following has occurred. CelPhon has breached the original contract with Dash, which has notified CelPhon of its intention to sue for damages. In addition, CelPhon has sold all of its assets to MobilFonz, Inc. (“MobilFonz”), a large national manufacturing company, over the objection of Chase, who voted against the sale believing the sale price to be grossly inadequate. Chase also has just learned that Ames and Baker have received lucrative consulting contracts and non-competition agreements from MobilFonz in connection with the sale.

What are the rights of the parties?

3. Alpha and Bravo were suspected of being terrorists. Each owned a cell phone. Neither had ever been arrested but both had received large deposits to their respective checking accounts from overseas banks.

Federal agents received an anonymous tip that Alpha and Bravo would be meeting other alleged members of their terrorist group near the Canadian border, although the exact location of the meeting was unknown. The group members would be bringing firearms and ammunition. The federal agents decided to track Alpha and Bravo by monitoring their cell phones' location. The agents had been informed that cell phones transmit signals that reveal the phone's precise physical location when it is turned on, even if it is not being used; and that the location of the cell phone could be obtained by sending a signal to the cell phone causing it to send a signal in return indicating the phone's location.

Alpha drove his car toward the Canadian border, followed by Bravo in a rented car. They occasionally talked with each other by cell phone but otherwise initiated no calls. The federal agents, trailing in unmarked police vehicles, frequently lost visual contact with the cars. Several times, Alpha and Bravo left the paved roads, drove onto land marked with large **NO TRESPASSING** signs and were not visible even to the police satellite tracking devices. About two miles from the Canadian border, both cars suddenly disappeared and the agents surmised that the cars had entered either a cave or a tunnel. On each occasion when the vehicles disappeared, the agents used the cell phone automatic identifying data, supplied to the agents by Alpha's cell phone service provider, to pinpoint Alpha's and Bravo's location, even when the cars were not visible.

The agents continued to monitor Alpha's cell phone location. About three days later, the cars reappeared on an interstate highway. Both cars were stopped and searched. In Alpha's car, police found \$15,000 in cash; subsequent investigation verified Alpha's statement that he had withdrawn \$50,000 from his bank account several days before. In Bravo's rented car, a search beneath the trunk revealed a false bottom and several assault rifles and ammunition as well as a small quantity of marijuana. Alpha and Bravo were arrested.

Alpha and Bravo wish to challenge both the searches of their vehicles and their arrest. What are the rights of Alpha and Bravo?

4. Emerald City, Massachusetts (“Emerald”) experienced fiscal problems. To save money, Emerald outsourced several municipal services, including public safety – police, fire and ambulance – to Mutual Services (“Mutual”), a private contractor of such services to municipalities throughout the country. Emerald has historically provided these basic municipal services to its citizens.

Emerald’s contract with the police, fire and ambulance personnel included a “termination for cause” provision and allowed for random employee drug testing. Emerald’s contract with Mutual requires Mutual to retain every police, fire and ambulance employee for a minimum of one year, unless the employee engages in conduct that would allow for termination for cause. The outsourcing contract also allows Mutual to conduct random drug testing of all police, fire and ambulance personnel.

Smith, a patrolman with 20 years of service in Emerald’s Police Department, was ordered by Mutual to take a drug test. Several other police officers who, like Smith, operated motor vehicles as part of their duties and responsibilities, were also ordered to take drug tests. Smith refused to take the drug test and Mutual terminated Smith’s employment immediately.

What are the rights and defenses, if any, of Smith and Emerald?

5. When John first visited the house that he now owns to see if he wanted to buy it, he noticed a few wood-boring insects on the floor of the garage that was attached to the house. The Seller told him at that time that the insects absolutely were found only in the garage. Thus, John's lawyer and the Seller's lawyer jointly prepared a purchase and sale agreement that everyone signed, containing the following two clauses:

? "Active wood-boring insects are located in the garage and will be exterminated by Seller at Seller's expense prior to closing."

? "The Buyer acknowledges that he has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth in this agreement."

A. The Seller performed the insect extermination in the garage prior to closing, but John has just learned (i) that his house is infested with wood-boring insects that have caused extensive structural damage to the house and (ii) that the Seller knew that the entire house was infested with the insects.

B. The dirt driveway to John's house is on a properly recorded easement that benefits his property over land owned by Phil. Phil wrote to John that he plans to build a housing subdivision on his property and, as part of that plan, Phil will move John's driveway (at Phil's expense) so that it does not run through the middle of Phil's property. Although this new driveway route to John's house over Phil's property will not significantly lengthen the route or lessen the usefulness of this easement, John does not want his driveway moved since the new driveway location will not have as beautiful a view.

What are the rights of the parties?

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AFTERNOON PAPER
QUESTIONS**

ESSAY SECTION

6. Wendy and Hal met and became engaged while in law school. Following graduation they each obtained positions in law firms in City, Massachusetts, and were married there in 2000. They shortly thereafter bought a house, held in both their names. Wendy had been married before, was divorced and had a daughter, Dana, who was two years old in 2000 and whom Hal later adopted.

On the night before the wedding, Wendy and Hal entered into an antenuptial agreement which they wrote down and signed on a sheet of stationery from the hotel where they held their rehearsal dinner. The agreement provided the following:

- ? Each of them would keep as their own such real and personal property as they owned in their own names at the time of the marriage.
- ? Any increase in the value of such property or the proceeds of any sale or exchange of it would belong solely to the owner.
- ? In the event of a divorce,
 - (a) each would waive claims for alimony, and
 - (b) custody of Dana and any children born of the marriage would be exclusively in Wendy.

A son, Sandy, was born to Wendy and Hal. Last year, they cross-filed for divorce. In discovery, Hal learned for the first time that Wendy was a beneficiary of a multi-million dollar family trust which has increased substantially in value since the marriage. Wendy learned that Hal had incurred an immense amount of credit card debt over several years and had never owned substantial assets.

While the divorce actions were pending, Wendy became a partner in her firm. Hal did not make partner in his firm and was let go. He has not found a new position.

In her divorce action, Wendy has asked the court to enforce the antenuptial agreement and to order Hal to pay her \$1,000 per week for the support of Dana and Sandy.

In his divorce action, Hal has requested that the agreement not be enforced and that he be granted (1) alimony of \$2,000 per week; (2) custody of Dana and Sandy; (3) child support of \$3,000 per week; and (4) 50% of Wendy's interest in the trust and 50% of the appraised value of her firm partnership.

What are the rights of the parties?

7. ABC, Inc. (“ABC”), a computer manufacturer, entered into a contract to supply Electronics USA, a national electronics retail chain, with 10,000 computers. The terms of the contract required delivery of the computers in 30 days with a substantial penalty for late delivery.

ABC’s president, Preston, immediately contacted Beta, Inc. (“Beta”), which manufactured computer chips needed by ABC for the computers, and arranged to meet with Beta’s sales manager, Sally, the following day. At the meeting, Preston explained to Sally the urgent nature of ABC’s contract. Sally assured Preston that Beta could make the chips and deliver them in time for ABC to fulfill its contract. Preston then signed several documents presented to him by Sally, who told Preston that they amounted to nothing more than Beta’s standard purchase contract and that ABC would be billed for the chips upon delivery. Preston, although very experienced in business, was in a hurry to leave and did not read the documents before signing them. Unknown to Preston, the documents he signed included a promissory note, payable on demand, in the amount of the full contract price. The next day, Beta negotiated the promissory note to Finance Company in payment of an overdue loan owed by Beta to Finance Company.

The computer chips have just been delivered by Beta to ABC, but they are all defective and unusable. ABC has located another manufacturer for the chips it needs, but they are much more costly and will not be available for an additional two months. As a result, ABC will incur the late delivery penalty under its contract with Electronics USA. In addition, Finance Company has demanded payment of the promissory note by ABC.

What are the rights of the parties?

8. Building was a multi-unit retail condominium located in a small shopping mall. One unit was owned by Seller, a member of the condominium association Board of Trustees which met each month.

Early in 2002, Seller, with the other trustees, received a Report from Engineer indicating serious structural problems with Building's foundation caused by repeated flooding; the estimated repair cost exceeded \$3 million. To pay for the repairs, each unit would be assessed at least \$250,000. The Report warned that failure to undertake the repairs immediately would dramatically increase the repair cost and might, ultimately, require replacement of the entire foundation. Seller discussed the Report with Buddy, Chair of the condominium Trustee Board but the Report was never discussed at any of the monthly condominium trustee meetings, no special assessment was proposed or approved and no repairs were begun.

In 2005, Seller sold his unit to Buyer. Seller was represented in the transaction by Broker, who was a former business partner of Seller, and Lawyer. Buyer was never told anything about Engineer's Report or the needed repairs by Seller, Lawyer or Broker. In response to specific questions, all three assured Buyer that the Building was in "great shape" and had been diligently maintained. Lawyer had seen the Report and Seller's wife had told Broker that she and Seller were moving because of "problems" with the building.

Several months after Buyer moved into Building, Buyer received notice of a special assessment attributable to his unit in the amount of \$500,000 to repair Building; the estimated total cost of repair was listed as \$10 million. Buyer sued Seller and Broker in Massachusetts Superior Court. At trial, the following occurred. In each instance, how should the Court rule and why?

- A. Buyer called Engineer to testify about the contents of the Report and its conclusions. Seller objected.
- B. Buyer offered the minutes of the monthly condominium trustee meetings to show that the Report and needed repairs were never mentioned. Seller objected.
- C. Buyer called Buddy to testify about what Buddy and Seller discussed about the Report. Buddy had been deposed before trial but later suffered a stroke and at trial remembered nothing. Buyer sought to introduce statements Buddy made during the deposition. Seller objected.

- D. Buyer called Seller's wife to testify about when and what Seller told her about Engineer's Report. Seller objected.
- E. Buyer called Lawyer to testify about whether or not Seller had given Lawyer a copy of the Report and whether Lawyer had told Buyer that Building had been diligently maintained. Seller objected.
- F. Buyer offered Buyer's copy of the Purchase & Sale Agreement to show that "excellent" had been checked next to the phrase "condition of the building" and that the Agreement had been signed by both Broker and Seller. Seller objected.
- G. Buyer called Broker to testify about Seller's reputation for truthfulness while they were business partners. Seller objected.

9. Joe flew on Airline from Manchester, New Hampshire Airport to New York City to visit family. While flying over Boston, Massachusetts, Joe began drinking martinis and when the flight attendant refused to serve him a fourth martini, Joe became unruly and threw his glass at her. The glass missed her, hit a seat, and several pieces of broken glass struck Peter and Jane, passengers on the flight. Jane received minor cuts. Peter received a permanent eye injury. At the time of the incident, the airplane was flying over New England, but it is unclear where.

Joe, a New Hampshire resident, works out of his house as a salesman for Futura, a biotech company headquartered in Cambridge, Massachusetts. Joe's sales region includes Maine, Massachusetts and New Hampshire. He visits Futura's headquarters once every two or three months. Otherwise, he communicates regularly with the headquarters by e-mail, telephone or overnight mail.

Airline is a Delaware corporation headquartered in New York City. Airline has personnel at airports in Massachusetts, New York, Washington, D.C., and New Hampshire. Approximately 40% of all of Airline's business departs from or arrives in Boston. The remainder of Airline's business is split evenly among New York, Washington, D.C., and New Hampshire.

Peter and Jane were on their honeymoon when the incident happened. Peter is a Massachusetts resident. Prior to their marriage, Jane lived in New Hampshire and worked there at a local hospital. After their marriage Jane moved into Peter's apartment in Massachusetts but stayed with her parents in New Hampshire during the week to work and she had no plans to change the arrangement. Jane had mail delivered to her Massachusetts address, but she had a New Hampshire driver's license and was registered to vote in New Hampshire.

Peter and Jane filed a lawsuit in Massachusetts Superior Court against Joe and Airline. The claims against Joe were for negligence and assault and battery. The claim against Airline was for negligence in serving Joe alcohol resulting in his conduct. Federal regulations govern the serving of alcohol during flights. Peter sought \$100,000 for his injuries and Jane sought \$10,000 for her injuries. Joe and Airline filed a motion to dismiss the lawsuit and a motion to remove the action to the U.S. District Court for the District of Massachusetts.

What are the rights and defenses of the parties, if any, raised by the motions?

10. For many years Hank was the Sales Manager and a member of the Board of Directors of Big Tool Corporation (“Big Tool”). In August 2005, Hank resigned both of his positions at Big Tool to go to work as the Sales Manager at Little Tool Corporation (“Little Tool”). Big Tool and Little Tool are competitors and are both Massachusetts-based sellers of industrial machinery.

After Hank went to work at Little Tool the following happened:

(1) Hank told several major customers of Big Tool that Little Tool’s products were superior to Big Tool’s products and that Big Tool was about to file for bankruptcy protection, even though there is no factual basis for either of these claims.

2) Hank told another major customer of Big Tool that, if it broke all of its current delivery contracts with Big Tool, Little Tool would give it a fifteen percent discount.

(3) Hank gave a copy of the confidential list of Big Tool’s customers to Little Tool’s sales employees.

(4) Hank gave to Little Tool’s President a copy of Big Tool’s July 2005 financial statement, distribution of which was restricted to Big Tool’s Board of Directors.

(5) At Hank’s request, Little Tool hired two key Big Tool employees, Alison and Burt. Prior to his leaving Big Tool, Hank had secretly solicited Alison, but not Burt, to leave Big Tool to come work with him at Small Tool.

(6) Hank sent a letter to many potential customers of Little Tool stating that, during 2006, Little Tool would undercut Big Tool’s publicly listed prices by ten percent.

What are the rights of the parties?